Washington International Law Journal

Volume 12
Number 1 *Symposium: Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law*

1-1-2003

Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea

Martin Davies

OBLIGATIONS AND IMPLICATIONS FOR SHIPS ENCOUNTERING PERSONS IN NEED OF ASSISTANCE AT SEA

Martin Davies[†]

Abstract: While there are multiple obligations to rescue individuals lost at sea, mostly expressed in multilateral treaties, there are limited mechanisms for enforcing those laws. Enforcement needs to be accomplished through criminal law, as the civil lawsuit is a poor mechanism. The United States and Australia provide adequate examples of the implementation, or lack thereof, of international treaties into criminal law. However, even where the various treaties have been incorporated into the law of the nation by implementing legislation, the enforcement remains ineffective. This is partially because the onus of enforcement falls primarily on the flag state of the ship in question, and many such states are unable or unwilling to use their criminal law to prosecute those who violate the obligation to assist at sea. Although there are ways for other countries to enforce the law of the sea upon a ship flying a foreign flag, such mechanisms are limited in application, unlikely to be utilized, and can be less effective than those of the flag state.

Weighing against enforcement are strong commercial disincentives to rescue those lost at sea. In addition to the out-of-pocket costs incurred by ship's owners, the operator can also lose significant profit for the hours or days the ship is in port or indisposed as a result of the rescue. It is likely that the latter costs will not be covered by insurance. As a consequence of these competing interests, it is probable that even if ports of call were to allow immediate offloading of refugees, it would fail to solve the problem, as the commercial disincentives still outweigh nonexistent criminal sanctions.

I. INTRODUCTION

Most of the contributions to this Symposium are concerned with what happened *after* the container ship M/V *Tampa* rescued the passengers of an Indonesian ferry in danger of sinking in the Indian Ocean. The "*Tampa* incident" arose because of Australia's response to the desire of the rescued passengers to seek refugee status there. Australia refused to allow the *Tampa* to put the rescued passengers ashore, passed retroactive border control legislation, and ultimately came up with the so-called "Pacific Solution" for claims to refugee status to be processed in Nauru and Papua New Guinea in return for Australian aid money.[1] This Article is not

[†] Professor of Maritime Law, Admiralty Law Institute and Co-Director, Maritime Law Center, Tulane Law School. The author would like to thank Candice Washington of the Tulane Law School, Class of 2004, for her research assistance in preparing this article for publication, and Jessica Tauman, Editor-in-Chief of the *Pacific Rim Law and Policy Journal*, who provided me with much useful information for the

principally concerned with Australia's much-criticized response to the situation after the rescue, but with the legal issues surrounding the rescue itself.

By rescuing the passengers of the sinking ferry, the master and crew of the *Tampa* obeyed both the moral obligation to save human life and the ancient maritime practice of providing assistance to fellow seafarers. There are also legal obligations to provide assistance to those in distress at sea, but this Article will show that they are poorly enforced and unlikely to provide a strong stimulus to action. Part II describes the international sources of the obligation of a shipmaster to provide assistance. Part III demonstrates that in almost all cases, that obligation can only be given legal force by the flag state—that is, the country in which the ship is registered. However, many ocean-going commercial ships are registered under flags of convenience[2] in countries that are notoriously unlikely to be zealous in enforcing the legal obligations imposed by the conventions.[3]

Set against these rather weak legal incentives to action are powerful commercial disincentives. Modern commercial ships have relatively small crews and therefore little accommodation space, and they carry very little extra food and water. As a result, any ship picking up a large number of persons at sea will very quickly be forced to seek out a port of refuge.[4] If

---

Australia's Tampa *Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim* symposium presentation.

[1] *See* Emily C. Peyser, Comment, *"Pacific Solution"? The Sinking Right to Seek Asylum in Australia*, 11 PAC. RIM L. & POL'Y J. 431 (2002); Jessica E. Tauman, Comment, *Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL'Y J. 461 (2002).

[2] In 2001, 27.54% of all merchant ships in the world (9747 of a global total of 30,538) were registered under one of the seven major flags of convenience, which are (in descending order of tonnage registered): Panama, Liberia, The Bahamas, Malta, Cyprus, Bermuda, and Vanuatu. U.N. Conference on Trade and Development, *Review of Maritime Transport 2001*, ch. II, tbls. 16, 17. The proportion of larger ocean-going vessels under flags of convenience is much higher. When deadweight tonnage (i.e., the ship's carrying capacity) is used as the measure, the seven main flags of convenience account for 49.54% of the world's merchant fleet (371,315,000 metric tonnes of a global total of 749,599,346). *Id.* For a historical account of the development of the flag of convenience system, *see* BOLESLAW ADAM BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY (1962); RODNEY CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981); H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L.J. 139 (1996).

[3] Bernard H. Oxman & Mary Coombs, *International Decision:* State v. Slepansky, *761 So.2d 1027 (Fla.), cert. denied, 121 S.Ct. 385 (2000) Supreme Court of Florida, Apr. 20, 2000*, 95 AM. J. INT'L L. 438, 442 (2001) ("In theory, the state with the most natural jurisdiction to act against shipboard crimes is the flag state. In practice, no one expects Liberia, as part of its 'flag of convenience' service for United States-based cruise ships and their corporate owners, to extradite, try, and punish those who commit crimes on board such ships."); ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY, §112b[6] (Frank L. Wiswall ed., 7th rev. ed. 2002). *See further infra*, notes 80-83 and accompanying text.

[4] The *Tampa*, with a crew of 27, picked up 438 people, who were then housed in empty containers on the ship's deck. Michael White, *M/V* Tampa *Incident and Australia's Obligations August 2001*, 122 MAR. STUD. 7, 7 (2002).

that port is not on the ship's intended itinerary, the deviation may prove costly because of the delay in completing the ship's voyage and delivering its cargoes, as Part IV will show. Part IV will also show that the standard insurance coverage carried by commercial ships does not indemnify the ship's operator against the substantial portion of the cost of such a delay. As a result, the ship's operator is left to bear the cost itself. In short, observing the duty to assist may cost the ship operator financially, particularly if, as in the case of the *Tampa*, the ship is prevented from promptly putting those rescued ashore at a place of refuge. This calls for considerable altruism on the part of the ship operator.

In a perfect world, the commercial cost of assisting those in danger at sea would play no part in the shipmaster's decision about whether to obey the legal and moral duty to stop and help. Sadly, because the legal duty to assist can be ignored with relative impunity, the commercial implications are likely to play a significant role in practice.[5] Part V will show the difficulty in advancing a reasonably practicable way of enhancing the obligation to provide assistance so that it would always outweigh the commercial disincentives. Thus, the position of those in danger at sea, such as the asylum seekers in the *Tampa* Incident, is perilous in many ways. Reluctance on the part of coastal states, such as Australia, to allow persons in distress to be delivered promptly to places of safety adds to their peril, by increasing the likelihood that ships will simply pass them by.[6] Forcing coastal states to provide places of refuge once those in peril have been recovered prevents

---

[5] In a reporting address to UNCLOS delegates, Douglas Stevenson, Director of the Center for Seafarers' Rights in New York, states:

> Evidence is hard to come by but there is no doubt that watchkeepers on some vessels, at least, pointedly look the other way as they close on small craft far from the shore. Quiet words have undoubtedly been spoken to masters about the inadvisability of being too zealously on hand and available when possibly leaky and overcrowded refugee vessels are seen trying to communicate with them.

Of Dogs, Fish and Men, LLOYD'S LIST, April 29, 2002, at 3.

I am indebted to Kassandra Slangan of the Tulane Law School Class of 2003 and former Tulane-sponsored intern at the Center for Seafarers' Rights for bringing this item to my attention.

[6] Since the *Tampa* incident, Australia has published a Protocol intended to provide guidance to shipmasters after they have given assistance to persons in distress at sea. Department of Transport and Regional Services, *Transport and Infrastructure Policy: Protocol for Commercial Shipping Rescuing Persons at Sea In or Adjacent to the Australian Search and Rescue Region*, http://www.dotars.gov.au/transinfra/sea_rescue_protocol.htm (last visited Aug. 20, 2002). Significantly, the Protocol does not contain any undertaking by Australia to allow rescued persons to be landed there. It says merely that, "Where Australia is the proposed State of disembarkation the Government will make an assessment as to the appropriateness of accepting the rescued persons, taking into account a range of factors including customs, migration and security arrangements." *Id*

costs from escalating once a rescue has occured,[7] but it cannot overcome the fundamental problem—the lack of force in the legal obligation to provide assistance in the first place.

II. INTERNATIONAL SOURCES OF THE OBLIGATION TO ASSIST

Three international conventions impose a duty to provide assistance to those in distress at sea. First, and most significant given the number of countries that are party to it, is the Safety of Life at Sea Convention (SOLAS), Ch. V, Regulation 10(a),[8] which provides:

> The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.

As of August 15, 2002, 146 countries had adopted SOLAS,[9] including all major flag of convenience countries.[10]

Regulation 10(a) purports to impose an obligation directly on the shipmaster. However, in some countries, treaty provisions do not have direct effect and so must be implemented by legislation.[11] Some countries that are parties to SOLAS may not have passed implementing legislation,[12] and others may have implemented the obligation in a different form than it appears in Regulation 10(a). Even in countries such as the United States,

---

[7] The International Maritime Organization is conducting a review of international conventions with the goal of ensuring that persons in distress at sea or other emergency situations are "promptly and effectively delivered to a place of safety, regardless of their nationality and status or the circumstances in which they are found." *Tampa Incident Prompts Review of Refugee and Asylum Issues*, IMO NEWS, Issue 4 2001, at 6. The I.M.O. response is considered by Frederick J. Kenney, Jr., & Vasilios Tasikas, *The* Tampa *Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 Pac. Rim L. & Pol'y J. 143 (2003).

[8] International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, 164 U.N.T.S. 113 as amended (entered into force May 25, 1980) [hereinafter SOLAS], *reprinted in* 6D BENEDICT, *supra* note 3, Doc. No. 14-1.

[9] *Summary of Status of Conventions,* http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Nov. 2, 2002) [hereinafter *Status of IMO Conventions*].

[10] All seven major flag of convenience countries (*see supra* note 2) are parties to SOLAS. *Status of Conventions-Complete List, at* http://www.imo.org/Conventions/mainframe.asp?topic_id=248 (last visited Nov. 3, 2002).

[11] Australia is an example. *See infra* note 128 and accompanying text.

[12] Australia appears to be an example of this, too. *See infra* notes 130-132 and accompanying text.

where treaties can have direct effect,[13] Regulation 10(a) may require implementing legislation.[14]

Another treaty provision relating to the duty to assist is found in the U.N. Convention on the Law of the Sea (UNCLOS), Article 98(1),[15] which provides:

> Every state shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers . . . to render assistance to any person found at sea in danger of being lost . . . and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may reasonably be expected of him.[16]

As of May 31, 2002, 138 countries had adopted UNCLOS,[17] including all major flag of convenience countries except Liberia.[18]

Even in countries where treaties can have direct effect,[19] Article 98(1) requires implementing legislation in order to acquire the force of law, because it is addressed to states, not individuals.[20] As noted above, some

---

[13] *See infra* notes 97-100 and accompanying text.

[14] This point is expanded later, *infra* Part 3(d). *See infra* notes 98-103 and accompanying text.

[15] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), 1833 U.N.T.S. 397 [hereinafter UNCLOS], *reprinted in* 21 I.L.M. 1261 and 6C BENEDICT, *supra* note 3, Doc. No. 10-6.

[16] *Id.* art. 98(1).

[17] *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 12 November 2001,* http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Nov. 3, 2002) [hereinafter *UNCLOS Parties*].

[18] Panama, The Bahamas, Malta, Cyprus, and Vanuatu (*see supra* note 2) are parties to UNCLOS. *See also UNCLOS Parties*, *supra* note 17. Bermuda is an overseas territory of the U.K., which declared its instruments of accession and ratification to extend to Bermuda (among other territories). THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Sales No. E.97.V.3 (1997), *available at* http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#United%20Kingdom (last visited Nov. 3, 2002).

[19] Although the United States is in this category (*see infra* notes 97-100 and accompanying text), it is not party to UNCLOS, because it does not agree with the provisions relating to mining on the sea-bed beyond national jurisdiction. LORI F. DEMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1383 (4th ed. 2001). A compromise on this issue by special agreement concluded in 1994 led the U.S. government to announce that it would move to adhere to the Convention and the 1994 Agreement, but the U.S. Senate has not yet given its consent to ratification. *Id.*

[20] To use the terminology employed in the United States, the U.N. convention is not self-executing. *See infra* note 99 and accompanying text.

countries that are party to UNCLOS may not have yet passed implementing legislation, despite their treaty obligation to do so.

Thirdly, the International Convention on Salvage 1989 ("Salvage Convention") provides:

> 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
> 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
> 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.[21]

As of July 30, 2002, forty countries had adopted the Salvage Convention.[22] The duty to render assistance under Article 10.1 of the Salvage Convention cannot exist when the ship encounters a person in danger of being lost at sea. The Convention only applies when "judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party."[23] If the duty to render assistance does exist, it exists only in inchoate form. For example, if a salvage arbitration or lawsuit is subsequently brought in a Salvage Convention country, the application of that country's implementation of the obligation is subsequently confirmed. If no salvage proceedings are brought, the Salvage Convention never comes into operation in relation to the incident. Thus, in many cases of ships encountering refugees or asylum seekers needing assistance at sea, the duty to assist under the Salvage Convention would not be applicable.

---

[21] International Convention on Salvage, Apr. 28, 1989, art. 10, S. Treaty Doc. No. 102-12 (entered into force July 14, 1996) [hereinafter Salvage Convention], *reprinted in* 20 J. MAR. L. & COM. 589 (1989).

[22] *Status of IMO Conventions*, *supra* note 9.

[23] Salvage Convention, *supra* note 21, art. 2.

III. GIVING LEGAL FORCE TO THE OBLIGATION TO ASSIST

A. Introduction

In theory, the obligation to assist may be enforced either by civil action or by criminal sanction.[24] In practice, civil actions alleging a failure to assist are very unlikely. To have standing in a civil action, those who claimed failure to assist must: (a) survive the ship's failure to pick them up;[25] (b) identify the ship that could have but did not pick them up; and, (c) establish jurisdiction over the shipmaster and/or the ship itself in the country of suit.[26] The likelihood of all these conditions being satisfied is so small that the prospect of civil action is not likely to provide much of a deterrent. The threat of criminal sanction is more likely to provide the main legal incentive for masters to comply with the obligation.

Because the need for assistance arises at sea, often beyond territorial waters, the key question is which country has jurisdiction to enforce the obligation to assist. The word "jurisdiction" is used in three different senses toward giving force to criminal laws in an international context: prescriptive jurisdiction (sometimes called legislative jurisdiction), adjudicative jurisdiction, and enforcement jurisdiction.[27] Prescriptive jurisdiction is a country's right to apply its laws to an incident.[28] Adjudicative jurisdiction is

---

[24] *See, e.g.*, Warshauer v. Lloyd Sabaudo, S.A., 71 F.2d 146 (2d Cir. 1934) (civil action brought by those in disabled motorboat against owners of ship that passed by without rendering assistance); Martinez v. Puerto Rico Marine Mgmt. Inc., 755 F. Supp. 1001 (S.D. Ala. 1990) (survivors of sailors who died during rescue attempt sued would-be rescuers for negligently failing to provide assistance as required by 46 U.S.C. §2304).

[25] A civil action could be brought by dependents if those in need of assistance were to die at sea, but identification of the ship would obviously be much more difficult in such a case—indeed, almost impossible unless a witness, such as a penitent crew member were to volunteer the information. *See, e.g.*, Sangeorzan v. Yangming Marine Transp. Corp., 951 F. Supp. 650 (S.D. Tex. 1997) (Romanian stowaways died after being thrown overboard following their discovery on a Taiwanese ship and the surviving family members sued shipowner relying on evidence of crew members as witnesses.).

[26] The same point is made rather more colorfully in Patrick J. Long, Comment, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFF. L. REV. 591, 610 (2000) ("Dead men tell no tales. Nor do they sue.").

[27] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (1987) [hereinafter RESTATEMENT]. *See also* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. OF INT'L L. 145, 145 (1974) (distinguishing executive jurisdiction, judicial jurisdiction, and legislative jurisdiction). Some writers simply distinguish between jurisdiction to prescribe from jurisdiction to enforce, and divide enforcement jurisdiction into adjudicative and executive enforcement. *See, e.g.*, 4 LOUIS HENKIN, *International Law: Politics, Values and Functions, General Course on Public International Law, in* 216 RECUEIL DES COURS 9, 313 (1989). For a useful overview of the academic debate about the meaning of "jurisdiction" in the international criminal context, see Tapio Puurunen, *The Legislative Jurisdiction of States Over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 689, 697-99 (2000).

[28] RESTATEMENT, *supra* note 27, § 401(a).

the power of a country to subject persons to its judicial process.[29] Last, enforcement jurisdiction is the power to punish noncompliance with the law.[30] If a country wishes to prosecute a shipmaster for failing to provide assistance to those in distress at sea, it must establish some basis for personal jurisdiction over the master (adjudicative jurisdiction).[31] It must also justify employing enforcement measures against him or her, particularly if he or she is not present in the territory (enforcement jurisdiction).[32] However, the first and most fundamental question is whether that country can validly purport to apply its laws to the master's conduct at all (prescriptive jurisdiction).[33]

Because we are concerned mainly with the question of how the obligation to assist acquires legal force at sea, the remaining sections of Part III focus on the question of prescriptive jurisdiction.[34] Part III.B examines the question of which countries may validly apply their laws to regulate the behavior of ships on the high seas. Part III.C considers the question of which countries' laws can validly be applied to conduct occurring in territorial waters. Part III.D and III.E then analyze the particular cases of the United States and Australia (the country most closely associated with the *Tampa* Incident), respectively.

B. The High Seas

There are five different bases for the exercise of criminal jurisdiction by a country: territoriality, which bases jurisdiction on the place where the offense is committed; nationality, which bases jurisdiction on the nationality or national character of the offender; protective, which bases jurisdiction on a threat to national interests, such as security or important government functions; passive personality, which bases jurisdiction on the nationality or national character of the victim; and universal, which recognizes the right of any nation to punish crimes against humanity.[35] Of these, territoriality is the

---

[29] *Id.* § 401(b).

[30] *Id.* § 401(c).

[31] *Id.* §§ 421, 422 (bases of jurisdiction to adjudicate in criminal cases).

[32] *Id.* § 431 (bases of jurisdiction to enforce).

[33] *Id.* § 402 (bases of jurisdiction to prescribe).

[34] Because the following parts of this Article are principally concerned with jurisdiction to prescribe, the expression "the exercise of criminal jurisdiction" should be understood to mean "the valid application of criminal laws" unless the context indicates otherwise.

[35] Harvard Law School, Research in International Law, *Jurisdiction with Respect to Crime: Draft Convention, with Comment*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter Harvard Draft Convention]. The Harvard Draft Convention formulation and the five named bases have been cited and applied in U.S. courts on several occasions. *See, e.g.*, Rivard v. United States, 375 F.2d 882, 885-86 (5th Cir. 1967); United States v. Smith, 680 F.2d 255, 257-58 (1st Cir. 1982); Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984); United States v. Alomia-Riascos, 825 F.2d 769, 771 (4th Cir.

most significant, because it provides the basis for the day-to-day exercise of criminal jurisdiction within the territory of the country in question.[36] Importantly, territoriality is often subdivided into subjective and objective categories.[37] Subjective territoriality applies in the standard situation where the offense or an element of it occurs within the state asserting jurisdiction; objective territoriality applies when conduct outside the territory has an effect within the territory.[38]

Territoriality is the principle that allows a state to have jurisdiction over conduct occurring on a ship flying the state's flag at sea, because of the legal fiction that the ship is an extension of the territory of the country whose flag it flies.[39] The primacy of the law of the flag is stated strongly in Article 92(1) of UNCLOS, which provides:

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.[40]

Consistent with this statement, the obligation to assist in UNCLOS, Article 98(1) is addressed only to the flag state.[41]

1987); United States v. Plummer, 221 F.3d 1298, 1307 (11th Cir. 2000); United States v. Keller, 451 F. Supp. 631, 634-35 (D.P.R. 1978). *See also* RESTATEMENT, *supra* note 27, § 402. *See generally* Christopher L. Blakesley, *Introduction· Brief Overview of the Traditional Bases of Jurisdiction Over Extraterritorial Crime, in* INTERNATIONAL CRIMINAL LAW 33 (M. Cherif Bassiouni ed., 2d ed. 1999); Akehurst, *supra* note 27, at 145, 152-66; Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 314-25 (2002).

[36] "[T]he first [basis for the exercise of criminal jurisdiction and territoriality] is everywhere regarded as of primary importance and of fundamental character." Harvard Draft Convention, *supra* note 35, at 445.

[37] Blakesley, *supra* note 35, at 47; Tuerkheimer, *supra* note 35, at 315.

[38] Blakesley, *supra* note 35, at 47; Tuerkheimer, *supra* note 35, at 315. The objective territoriality principle is often associated with Justice Holmes' observation in *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.").

[39] United States v. Flores, 289 U.S. 137 (1933) ("A merchant vessel . . . for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty . . ."); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 313 n.1 (1970).

[40] UNCLOS, *supra* note 15, art. 92(1). *See, e.g.*, United States v. Arra, 630 F.2d 836, 840 (1st Cir. 1980) (United States Coast Guard authorized to board U.S.-flagged vessel on high seas, despite foreign nationality of owner, because ship had U.S. nationality by virtue of U.S. registration; relying on predecessor to UNCLOS).

[41] *See* UNCLOS, *supra* note 15 and accompanying text.

Although Article 92(1) states that the jurisdiction of the flag state is *exclusive* on the high seas, any of the other bases of international criminal jurisdiction may authorize application of a country's laws to acts committed on a foreign-flagged ship on the high seas. For example, in *United States v. Pizdrint*,[42] the U.S. District Court for the Middle District of Florida held that the United States could properly exercise criminal jurisdiction over an assault and battery committed on a Liberian-flagged cruise ship on the high seas, because of the effect the defendant's actions had within the United States.[43] Similarly, the United States often relies on the objective territoriality principle and/or the protective principle as the basis for prosecuting drug smugglers bound for the United States on foreign ships in the high seas.[44]

Thus, it may be possible for countries other than the flag state to assert criminal jurisdiction due to a failure by a shipmaster to give assistance to people in distress on the high seas. However, any extraterritorial criminal jurisdiction asserted by the non-flag state would then be concurrent with the subjective territorial jurisdiction of the flag state over the same incident.[45] As a matter of international law, it is not clear which country's sovereignty should yield when jurisdiction is asserted by both.[46]

In cases of crimes committed on foreign ships in territorial waters, U.S. courts have held that the law of the flag state should prevail in relation to matters of internal discipline aboard the vessel. They have also held, however, that the law of the coastal state should apply to serious matters involving "the peace or dignity of the country, or the tranquility of the

---

[42] United States v. Pizdrint, 983 F. Supp. 1110 (M.D. Fla. 1997). *See also* United States v. Roberts, 1 F. Supp.2d 601 (E.D. La. 1998) (authorizing exercise of jurisdiction in relation to sexual abuse of a minor on Liberian-flagged vessel on the high seas).

[43] The court said that this departure from the exclusive jurisdiction of the flag state was justified by "the objective territorial exception." *Pizdrint*, 983 F. Supp. at 1112; *Accord Roberts*, 1 F. Supp. 2d at 608.

[44] *See, e.g.*, United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980); United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985); United States v. Peterson, 812 F.2d 486 (9th Cir. 1987); United States v. Robinson, 843 F.2d 1 (1st Cir. 1988); United States v. Davis, 905 F.2d 245 (9th Cir. 1990); United States v. Angola, 514 F. Supp. 933 (S.D. Fla. 1981); United States v. Biermann, 678 F. Supp. 1437 (N.D. Cal. 1988).

[45] 2 BENEDICT, *supra* note 3, §112b[6].

[46] There are no general principles of customary international law governing such situations. *Flores*, 289 U.S. 137 (citing PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 144-93 (1927)). *See also* HENKIN, *supra* note 27, at 282-85; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2001) (stating "[P]rivate international law has not yet developed rules or criteria of sufficient clarity to consider priorities in the exercise of criminal jurisdiction whenever more than one state claims jurisdiction."). As a result, states have been left to resort to bilateral treaties in an effort to protect their nationals from double or conflicting liability, particularly in the area of tax law. Puurunen, *supra*, note 27, at 712.

port"[47] *unless* there has been no assertion of jurisdiction by the coastal state, in which case the law of the flag state may be applied.[48] A non-flag state's extraterritorial application of its laws to a foreign vessel in the high seas is weaker than that of a coastal state applying its laws to serious offenses on foreign vessels in its territorial waters. In these circumstances, it seems both appropriate and consistent with the spirit of UNCLOS, Article 92(1), to grant precedence to the flag states law in all high seas cases, and also to recognize non-flag states jurisdiction if the flag state has not done so.[49] This seems to be the best explanation of *Pizdrint*,[50] where U.S. law was applied under the objective territoriality principle in circumstances where there was no indication that the flag state (Liberia) had taken or would take action to prosecute the alleged offender.[51]

Whether or not this proposed solution is the best one in all cases of concurrent criminal jurisdiction on the high seas, it is appropriate to enforce the obligation to give assistance to those in distress at sea. Concurrent jurisdiction only creates difficulties where there are conflicts between the laws of the two countries asserting jurisdiction. This might happen, for example, when a person is forbidden by one law to commit an act that is permitted or required by another law.[52] In the situation presently under consideration, there is no true conflict; the laws of both flag state and non-flag state should require the shipmaster to give assistance, by virtue of one or more of the conventions considered above, or domestic legislation implementing them. Thus, the non-flag state's interests should be adequately protected by enforcement of the convention norms by the flag state.

In summary, international law bestows precedence to flag state enforcement to incidents on the high seas, but allow assertions of

---

[47] Mali v. Keeper of the Common Jail (Wildenhus' Case), 120 U.S. 1, 11-12 (1887).

[48] *See* United States v. Flores, 289 U.S. 137 (1933) (defendant charged under U.S. law with murder committed on a U.S. vessel 250 miles up the Congo River; no local action taken); United States v. Reagan, 453 F.2d 165 (6th Cir. 1971) (defendant charged under U.S. law of voluntary manslaughter committed on a U.S. vessel in German port; German authorities had considered charging defendant but decided not to do so).

[49] 2 BENEDICT, *supra* note 3, §112b[6]. *See also* George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 TUL. MAR. L.J. 217, 227-37 (1996).

[50] *See supra* note 42 and accompanying text.

[51] *See also accord* United States v. Roberts, 1 F. Supp.2d 601, 607 (E.D. La. 1998) ("The Court must also add that the country whose flag the cruise ship flies under, Liberia, has little to no interest in the alleged offense because neither the victim nor the defendant are [sic] Liberian, the vessel does not operate in or around Liberian territory, and the vessel's owners center their corporate operations in the United States.").

[52] Akehurst, *supra* note 27, at 167-68; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U S. Law*, 24 L. & POL'Y INT'L BUS. 1, 76-77 (1992).

jurisdiction by non-flag states if the flag state has taken no action. At first glance, the possibility of non-flag state enforcement may provide a promising alternative to the predictable inaction expected of a flag of convenience flag state. However, it is very unlikely that any country other than the flag state would be authorized to take action in any event, or would be willing to do so if authorized.

1. Objective Territoriality

Objective territoriality applies when conduct outside the territory has an adverse effect within the territory.[53] In *Pizdrint*,[54] the court held that the exercise of U.S. jurisdiction was justified under the objective territorial principle, because in part, the cruise on which the assault occurred, originated, and terminated in the United States, and the F.B.I. became involved when the ship arrived in the United States.[55] If territorial contacts and police investigations were sufficient to justify the assertion of jurisdiction, there might be a basis for a non-flag state to assert jurisdiction over a ship when the shipmaster failed to give assistance to those in distress at sea, the ship was in the non-flag state's port, and the non-flag state's police force or Coast Guard were called on to conduct an investigation at that port. It seems unlikely, however, that the mere fact of investigation would be sufficient in itself to justify the assertion of jurisdiction. In *Pizdrint*, there were several other factors connecting the incident with the United States, including the nationality of the victim, the nationality of the other passengers on the ship (potential witnesses), and the permanent residence of the defendant.[56] In the case of persons in distress at sea, it would be very unusual to find so many objective connecting factors pointing towards a single country.

It seems more likely that the persons in need of assistance would be citizens of one country, the shipmaster a citizen of another, the ship's last port of call would be in a third country and its next port of call (and the possible site of an investigation) in a fourth. The *Tampa* Incident provides a typical example: the passengers on the sinking ferry were Afghans and Iraqis, the master of the *Tampa* was Norwegian, the ship's last port of call before encountering the ferry was in Australia and its next port of call was in

---

[53] *See supra* notes 35, 38 and accompanying text.

[54] *See supra* note 42.

[55] United States v. Pizdrint, 983 F. Supp. 1110, 1113 (M.D. Fla. 1997).

[56] *Id. See also accord* Roberts, 1 F. Supp. 2d at 608 (listing similar objective effects as authorizing exercise of jurisdiction under the objective effect principle).

Singapore.[57] If the *Tampa* had not rescued those in peril, the most significant and relevant adverse effects would have been on Afghanistan, Iraq, and possibly Singapore.[58] Afghanistan and Iraq would presumably have shown little interest in prosecuting the master, despite the objective effect on their citizens, because those citizens were fleeing from their ruling regimes. Afghanistan would probably not have had any laws to enforce against a master who failed to pick up its citizens at sea, because it is not party to UNCLOS, SOLAS, or the Salvage Convention.[59] There would only be an objective effect in Singapore if Singapore were to take steps to investigate the master's failure to pick up the refugees. As noted above, it is doubtful whether territorial contacts would be enough to justify an assertion of criminal jurisdiction by Singapore, in the absence of other objective connecting factors.

In summary, it can be said that if several connecting factors point towards a single country so that there is a considerable objective effect within that country (as there was in *Pizdrint*), then there may be a basis for that country to assert jurisdiction under the objective territoriality principle, even though it is not the flag state. However, in the context of refugees in peril at sea, the country with the most conflicts is the one from which the refugees are fleeing; such a country will not be enthusiastic about taking action.

2. *Nationality Jurisdiction*

Nationality jurisdiction is based on the nationality or national character of the offender.[60] For example, in *Reg. v. Kelly*,[61] the House of

---

[57] White, *supra* note 4, at 7.

[58] Of course, in the *Tampa* Incident itself, there was considerable objective effect on Australia, but that was principally because Capt Rinnan *did* pick up the refugees. Here we are imagining what would have been the objective effects if he had not done so.

[59] *Status of IMO Conventions*, *supra* note 9, *UNCLOS Parties*, *supra* note 17. Afghanistan's non-membership is at least partly explained by the fact that it is a land-locked nation. That is not enough in itself to explain non-membership, however, as many land-locked nations are parties to the convention. A. MPAZI SINJELA, LAND-LOCKED STATES AND THE UNCLOS REGIME (1983). Iraq is party to UNCLOS and SOLAS, but not the Salvage Convention. *Status of IMO Conventions*, *supra* note 9; *UNCLOS Parties*, *supra* note 17.

[60] *See supra* note 35 and accompanying text. The United States has only sparingly relied on this principle to apply its laws to individuals living abroad on the basis of their U.S. nationality or permanent residence. RESTATEMENT, *supra* note 27, §402, note 1. Rare examples include the treason statute, 18 U.S C. §2381 (2000). *See* Chandler v. United States, 171 F.2d 921, 929-30 (1st Cir. 1948). In the context of crimes at sea, Congress relied on the national principle in 1994 when enacting 18 U.S.C. §7(8) (2000). *See infra* notes 67, 68 and accompanying text.

[61] Regina v. Kelly, 1987 App. Cas 665.

Lords affirmed the conviction of British subjects in a British court for offenses of criminal damage committed while they were passengers on a Danish-flagged ship on the high seas. The British subjects were brought before the court by operation of a U.K. statute asserting jurisdiction over British subjects committing offenses on foreign ships.[62] Although jurisdiction was based on the offenders' British nationality, it is also significant that the ship's next port of call was in the United Kingdom.[63] That fact provides a ready explanation for why the British police were prepared to investigate the incident and the prosecuting authorities later chose to prosecute the offenders. The scenario might have been different in a case where there was no immediate impact in the offender's country.

If the *Tampa* had been registered in Panama rather than Norway, for example, nationality jurisdiction would still have justified an assertion of jurisdiction by Norway as a non-flag state if Capt. Rinnan, a Norwegian citizen, had failed to pick up the Afghan and Iraqi persons in need of help. Norway, however, would have had to feel very strongly about the importance of aiding those in distress at sea in order to justify taking action against one of its citizens for failing to aid foreigners while sailing on a foreign-flagged ship between ports in foreign countries.

In summary, it can be said that although nationality jurisdiction provides a possible basis for the assertion of criminal jurisdiction, it will not often prevail as the sole basis for prosecuting a failure to provide assistance to those in distress at sea; instead, it may be used in conjunction with one or more of the other jurisdictional bases.

3. *The Passive Personality Principle*

Passive personality jurisdiction is based on the nationality or national character of the victim.[64] In the case of a failure to assist refugees or asylum seekers needing assistance at sea, the country from which the refugees were fleeing could assert criminal jurisdiction over the shipmaster based on passive personality. Like objective territoriality,[65] however, it is doubtful that any country would go to the trouble of exercising extra-territorial

---

[62] Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, §686(1) (Eng.). The opinion of the House of Lords was based on interpretation of this statute, rather than any consideration of principles of international law. *See* Regina v. Kelly, 1987 App. Cas. 665.

[63] Regina v. Kelly, 1987 App. Cas. 665.

[64] *See supra* note 35 and accompanying text. *See generally* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L. J. 1 (1993).

[65] *See infra* Section III.B.1.

criminal jurisdiction in order to protect the interests of citizens who have been forced to flee its territory.

Although the United States has historically been opposed to jurisdiction based on passive personality,[66] its use in the context of crimes at sea was explicitly endorsed by Congress in 1994 with the introduction of 18 U.S.C. §7(8) (2002). This legislation provides that the special maritime and territorial jurisdiction of the United States[67] extends "[t]o the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States."[68] Because few, if any, refugees or asylum seekers at sea are likely to be nationals of the United States, this provision has no direct impact on the situation presently under consideration, but it may apply to U.S. nationals in need of assistance at sea for other reasons, such as survivors of a shipwreck.

4. Protective Jurisdiction

A state's protective jurisdiction is based on a threat to its national interests, such as security or important government functions.[69] It differs from objective territoriality in that it is not necessary for the acts in question to have any actual effect within the territory, provided there is a threat to national interests.[70] In the United States, at least, its use has generally been confined to cases involving actual or attempted illegal immigration[71] or attempted drug smuggling.[72] Like passive personality,[73] protective

---

[66] Tuerkheimer, *supra* note 35, at 320.

[67] *See infra* Section III.B.4.

[68] 18 U.S.C. §7(8). Use of the passive personality principle has recently been revitalized in the context of anti-terrorist legislation. *Accord Roberts*, 1 F. Supp. 2d at 607 (citing authorities). *See also* RESTATEMENT, *supra* note 27, §402 cmt. (g) (1987) (passive personality principle "has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.").

[69] *See supra* note 35 and accompanying text.

[70] United States v. Khalje, 658 F.2d 90, 92 (2d Cir. 1981) (jurisdiction based on protective principle where no actual effects in the United States justifying the use of objective territoriality principle).

[71] *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968) (false visa application in U.S. Consulate in Montreal); United States v. Williams, 464 F.2d 599, 601 (2d Cir. 1972) (acts in Jamaica inducing illegal immigrants to enter the United States); United States v. Khalje, 658 F.2d 90, 92 (2d Cir. 1981) (false visa application in U.S. Consulate in Montreal); United States v. Birch, 470 F.2d 808, 811-12 (4th Cir. 1972) (obtaining false military pass in Germany); Rocha v. United States, 288 F.2d 545, 549 (9th Cir. 1961) (sham marriages in Mexico for U.S. immigration purposes).

[72] United States v. Angola, 514 F. Supp. 933, 936 (S.D. Fla. 1981); United States v. Romero-Galue, 757 F.2d 1146, 1154 (11th Cir. 1985); United States v. Alomia-Riascos, 825 F.2d 769, 771 (4th Cir. 1987); United States v. Peterson, 812 F.2d 486, 493-94 (9th Cir. 1987); United States v. Biermann, 678 F. Supp.

jurisdiction has also been invoked recently in the United States to justify extraterritorial jurisdiction in its anti-terrorist legislation.[74]

It is difficult to imagine how a non-flag state could use the protective principle to justify the assertion of criminal jurisdiction over a shipmaster failing to rescue those in need of assistance at sea. The relevant international conventions are plainly designed for the protection of individuals, not broad national interests or an entire national community. Even if the preservation of the life and health of individual people were regarded as a sufficiently important national interest to justify invocation of the principle, it would then only justify the assertion of jurisdiction by the country whose people were threatened by inaction. In the context of refugees and asylum seekers at sea, that country would once again be the country from which they are fleeing persecution. Just as objective territoriality and passive personality are weak bases for a non-flag state to exercise jurisdiction, the chances are remote that a country would exercise extraterritorial criminal jurisdiction to protect the interests of those seeking refuge from its regime.

5. *Universal Jurisdiction*

Universal jurisdiction was originally confined to cases of piracy,[75] but has expanded to include other offenses, such as slave trading, war crimes, genocide, torture, and other human rights violations.[76] Unless an applicable treaty specifically provides a basis for universal jurisdiction, its exercise is generally reserved for the most serious international crimes – crimes that shock the conscience.[77] The rationale behind the exercise of universal jurisdiction is that states act as a surrogate for the international community

---

1437, 1444-45 (N.D. Cal. 1988). *See generally* Christina E. Sorensen, Comment, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 217-19 (1990).

[73] *See supra* note 68.

[74] Tuerkheimer, *supra* note 35, at 319-20.

[75] Bassiouni, *supra* note 46, at 108-112; Akehurst, *supra* note 27, at 160. *See also* The Malek Adhel, 2 How. 210, 232 (1844); In re Piracy Iure Gentium, 1934 App. Cas. 586, 589 (P.C. 1934). Universal jurisdiction for piracy now has a treaty basis. *See* UNCLOS, *supra* note 15, art. 105.

[76] Bassiouni, *supra* note 46, at 112-34; Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 789 (1988); RESTATEMENT, *supra* note 27, §404. *See, e.g.*, Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (Stating that Israel had universal jurisdiction to prosecute alleged war criminals). Offenses committed on stateless vessels are also subject to universal jurisdiction because such vessels do not fall within the veil of a sovereign's territorial protection, and so all nations can treat them as their own territory and subject them to their laws. United States v. Marino-Garcia, 679 F.2d 1373, 1382-83 (11th Cir. 1982); United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995). Of course, few, if any, ships encountering refugees or asylum seekers in distress at sea will be stateless vessels.

[77] Bassiouni, *supra* note 46, at 82.

because: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) the international community has an interest to enforce.[78] These conditions are not satisfied in the situation under consideration here, because several states potentially have a direct interest and a basis for exercising jurisdiction under the traditional doctrines. Sailing past those in distress at sea might be considered serious, but it is not serious enough to justify universal jurisdiction. Universal condemnation of an act is not sufficient to make the universal principle applicable.[79]

6. Summary in Relation to the High Seas

There are various bases in international law for a non-flag to assert criminal jurisdiction over events occurring on a ship in the high seas. In the case of a failure to provide assistance to those in distress in the high seas, however, the non-flag state most likely entitled to take action is the country of citizenship of those in distress. In the case of refugees and asylum seekers needing assistance, that country will probably be reluctant to take action. Unless the country of citizenship of the shipmaster is inclined to take action based on the nationality principle, the only country that can give legal force to the obligation to assist on the high seas is the flag state.

Flag-of-convenience flag states are notoriously unlikely to enforce the obligation to provide assistance. Liberia, the second-largest flag-of-convenience state,[80] has neither the means nor the inclination to give legal force to the international conventions described in Part II.[81] Other flag-of-

---

[78] *Id.* at 96.

[79] *Id* at 90.

[80] *See supra* note 2.

[81] *See* Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) (refusing enforcement of judgment of Liberian court on grounds that Liberia did not provide impartial tribunals or procedures compatible with due process). The District Court decision affirmed by the Second Circuit contains an extensive description of the conditions in Liberia and their effect on the legal system. *See* Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 278-81 (S.D.N.Y. 1999). The Second Circuit noted that the Country Reports prepared by the State Department under Congressional directives were rightfully admitted as evidence. *Bridgeway*, 201 F.3d at 143. The latest State Department Country Report on Liberia says, "The judicial system is functional but extensively manipulated by the executive branch," but notes that: "Liberia is still trying to recover from the ravages of war. Five years after the war, pipe-borne water and electricity are still unavailable and schools, hospitals, roads, and infrastructure remain derelict." *Background Note: Liberia*, http://www.state.gov/r/pa/ei/bgn/6618.htm (last visited Aug 20, 2002). The Liberian ship registry does have an office in Monrovia, Liberia, but its headquarters are in the United States, in Vienna, Virginia. *Liberian International Ship and Corporate Registry*, http://www.liscr.com/ (last visited Aug. 15, 2002).

convenience countries, such as Vanuatu and the Marshall Islands,[82] are so small and so poor that they do not have the resources to pursue extra-territorial enforcement of their laws.[83]

C. *In Territorial Waters*

For incidents occurring in territorial waters, both the flag state and the coastal state have a valid claim to exercise jurisdiction under the territoriality principle. Because territorial waters are subject to the sovereignty of the coastal state,[84] that country's claim to exercise jurisdiction over part of its sovereign territory would be clearly paramount.[85] International law, however, also recognizes that ships have a right of innocent passage through the territorial sea.[86] Article 27(1) of UNCLOS resolves the overlap of jurisdiction in the following way:

> The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial

---

[82] Vanuatu is the seventh-largest flag of convenience country. U.N. Conference on Trade and Development, *Review of Maritime Transport 2001*, *supra* note 2. The Marshall Islands is the seventeenth largest flag of convenience country. *Id.*

[83] The economy of Vanuatu is based primarily on subsistence or small-scale agriculture; U.S. Government assistance is the mainstay of the tiny Marshall Islands economy. *Vanuatu and Marshall Islands*, C.I.A. WORLD FACTBOOK 2001, *at* http://www.odci.gov/cia/publications/factbook/index.html (last visited Aug. 19, 2002). Neither country has many natural resources, and in both, imports far exceed exports. *Id.* For accounts of some of the problems besetting the Marshall Islands, see Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT'L L. & POL'Y 399 (1998); John C. Babione, Note, *Mission Accomplished? Fifty-Four Years of Suffering for the People of the Marshall Islands and the Latest Round of Endless Reconciliation*, 11 IND. INT'L & COMP. L. REV. 115 (2000); J. Chris Larson, Note, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495 (2000).

[84] UNCLOS, *supra* note 15, art. 2(1). "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." *Id.*

[85] For example, in *Cunard Steamship Co. v. Mellon*, the court stated:

> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them.

Cunard Steamship Co. v. Mellon, 262 U.S. 100, 124 (1923).

[86] UNCLOS, *supra* note 15, art. 17: "[S]hips of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." *See generally* PHILIP JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 120 (1927) ("The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters.").

> sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
> (a) if the consequences of the crime extend to the coastal State;
> (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
> (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
> (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[87]

The position in the United States, which is not party to UNCLOS,[88] is similar to the language of Article 27(1). As noted above, the practice in U.S. courts is that the law of the flag state prevails in matters of internal discipline aboard the vessel, but the law of the coastal state applies to serious matters involving "the peace or dignity of the country, or the tranquility of the port" unless there has been no assertion of jurisdiction by the coastal state, in which case the law of the flag state may be applied.[89]

Leaving endangered people to meet their fate without assistance seems clearly to disturb the "good order" of the territorial sea and is likely to have consequences that extend to the coastal state. For many coastal states, those consequences stem in part from their obligations under the International Convention on Maritime Search and Rescue ("SAR Convention").[90] The SAR Convention requires parties, either individually or in cooperation with other states, to participate in the development of search and rescue services to ensure that assistance is rendered to persons in distress at sea.[91] Further, parties are required to ensure that assistance is provided to any person in distress at sea, regardless of their nationality or

---

[87] UNCLOS, *supra* note 15, art. 27(1).

[88] *See* DEMROSCH ET AL., *supra* note 19.

[89] Mali v. Keeper of the Common Jail (Wildenhus' Case), 120 U.S. 1, 11-12 (1887). *See also* note 48 and accompanying text.

[90] International Convention on Maritime Search and Rescue, Apr. 27, 1979 (entered into force on June 27, 1985), T.I.A.S. No. 11093, (as amended May 18, 1998 by resolution of the IMO's Maritime Safety Committee (Res. MSC.70(69)) with effect from Jan. 1, 2000) [hereinafter SAR Convention], *reprinted in* 6 BENEDICT, *supra* note 3, Doc. No. 3-14. As of August 15, 2002, seventy-three countries are party to the SAR Convention. *Status of IMO Conventions*, *supra* note 9.

[91] SAR Convention, *supra* note 90, Annex, art. 2.1.1.

status or the circumstances in which they are found.[92] If a coastal state that is party to the SAR Convention were to direct a commercial ship to provide assistance to persons in distress at sea,[93] that country would be entitled to exercise criminal jurisdiction over the master if he or she refused to comply, regardless of whether the ship was on innocent passage at the time.

In summary, the prospects of enforcement are much stronger in territorial waters than they are on the high seas. The primary jurisdiction lies with the coastal state, rather than the flag state. The flag state would still be entitled to take action if the coastal state did not.[94]

D. The United States Position

The United States is not a party to UNCLOS,[95] but it is party to the Salvage Convention, SOLAS and the SAR Convention.[96] Although the SOLAS treaty as a whole forms part of the "supreme Law of the Land,"[97] it is very doubtful whether a master could be prosecuted for violating SOLAS, Ch. V, Regulation 10(a) itself.[98] Treaty provisions only create individual rights and obligations if they are "self-executing."[99] The question of whether a treaty is self-executing is a very difficult one to be considered in detail in this context.[100] Most judicial considerations address whether a

---

[92] *Id.* Annex, art. 2.1.10.

[93] The *Tampa* did not encounter the sinking ferry by chance; it was sent to investigate by Australian Search and Rescue ("AusSAR"), a division of the Australian Maritime Safety Authority ("AMSA"). Michael White, *The TAMPA and the Law*, SEAWAYS, THE INTERNATIONAL JOURNAL OF THE NAUTICAL INSTITUTE 5 (Oct. 2001); Tauman, *supra* note 1, at 463-64.

[94] United States v. Flores, 289 U.S. 137 (1933).

[95] *UNCLOS Parties*, *supra* note 17.

[96] *Status of IMO Conventions*, *supra* note 9.

[97] U.S. CONST. art. VI, cl. 2.

[98] *See supra* note 8 and accompanying text.

[99] SOLAS; *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415, 435 (1829) (Marshall, C.J.) (treaty "equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision"). The earliest use by the Supreme Court of the term "self-executing" appears to have been in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 146 (1999).

[100] The distinction between self-executing and non-self-executing treaties has been described as the "most confounding" in the U.S. law of treaties. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979); United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992). For a detailed examination of the question, *see* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992); Jordan Paust, *Self-Executing Treaties*, 82 AMER. J. INT'L L. 760 (1988); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

treaty confers an individual right of action[101] or provides a defense to a criminal prosecution,[102] rather than if a treaty can impose an obligation on an individual enforceable by prosecution. It is generally assumed, however, that a treaty creating an international crime could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense.[103]

As a result, any prosecution of a master for failing to pick up those in need of assistance at sea must be for violation of some federal or state criminal statute. So far as federal law is concerned, the most significant provision is 46 U.S.C. §2304(2000), which provides:

> (a) A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board.
> (b) A master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both.[104]

Because there are no provisions indicating the geographical scope of operation of this section, any application of it would have to be justified by

---

[101] *See, e g.*, McKesson H.B.O.C., Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1107-08 (D.C. Cir. 2001) (whether Treaty of Amity between Iran and U.S. created private right of action for expropriation of property by Iran).

[102] For example, the Supreme Court recently stated in *dicta* that the Vienna Convention on Consular Relations "arguably confers on an individual the right to consular assistance following arrest." Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam). As a result, there have been many cases in which defendants have sought to have indictments quashed or evidence suppressed because of a failure to provide them with consular assistance. One Circuit Court has held that the Convention provides no individual right to assistance. United States v. Jimenez-Nava, 243 F.3d 192, 196 (5th Cir. 2001). Others have held that whether or not the Vienna Convention creates individual rights, quashing of an indictment or suppression of evidence is not an appropriate remedy for violation of those rights. United States v. Li, 206 F.3d 56, 60-61, 66 (1st Cir. 2000) (en banc); United States. v. Page, 232 F.3d 536, 541 (6th Cir. 2000); United States v. Chaparro-Alcantara, 226 F.3d 616, 622 (7th Cir. 2000); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000) (en banc); United States v. Chanthadara, 230 F.3d 1237, 1255-56 (10th Cir. 2000); United States v. Minjares-Alvarez, 264 F.3d 980, 986-87 (10th Cir. 2001); U.S. v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000); United States v. Duarte-Acero, --- F.3d ---, 2002 WL 1491634, *4 (11th Cir. 2002).

[103] RESTATEMENT, *supra* note 27, §111 cmt. i, note 6.

[104] *See generally*, Long, *supra* note 26 (considering legislative history and general maritime law context of 46 U.S.C. §2304).

one of the jurisdictional principles identified in previous section, such as the American nationality of the victim[105] or the offender.[106]

Title 18 of the U.S. Code also creates offenses in relation to conduct in the "special maritime and territorial jurisdiction of the United States," which includes:

> The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.[107]

The reach of the "special maritime and territorial jurisdiction" is far from clear.[108] The difficulty in defining the reach of the statute arises in part because of the use of the vague term "belonging," both in 18 U.S.C. §7(1) and also in 18 U.S.C. §9, which provides that the term "vessel of the United States" means a vessel "belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof."[109]

A ship registered in the United States is plainly within the special maritime and territorial jurisdiction when on the high seas.[110] A ship on the high seas is also within the special maritime and territorial jurisdiction if the registered owner is a U.S. citizen or U.S. corporation.[111] A ship may even

---

[105] *See, e.g.*, Warshauer v. Lloyd Sabaudo, S.A., 71 F.2d 146, (2d Cir. 1934) (predecessor of 46 U.S.C. §2304 applied to Italian ship failing to give assistance to U.S. citizens; no explicit consideration of basis for application of statute). *Compare* Peninsular & Oriental Steam Nav. Co. v. Overseas Oil Carriers, Inc., 418 F. Supp. 656, 660, (S.D.N.Y. 1976) ("As a foreign flag vessel operating in international waters, the S.S. *Canberra* was not subject to the criminal sanctions of 46 U.S.C. §728 [predecessor of 46 U.S.C. §2304].").

[106] *See, e.g.* Martinez v. Puerto Rico Marine Mgmt. Inc., 755 F. Supp. 1001 (S.D. Ala. 1990) (46 U.S.C. §2304 applied to U.S. ship negligently failing to provide assistance to Honduran fishermen; no explicit consideration of basis for application of statute).

[107] 18 U.S.C. § 7(1).

[108] *Id.*

[109] *Id.*

[110] *See, e.g.*, Nixon v. United States, 352 F.2d 601 (5th Cir. 1965); United States v. Ross, 439 F.2d 1355 (9th Cir. 1971).

[111] *See, e.g.*, United States v. Zenon-Encarnacion, 185 F. Supp. 2d 127, 135 (D.P.R., 2001) (military vessel owned by United States itself).

be within these jurisdictions if there are U.S. citizens among the shareholders in a foreign corporation that is the ship's registered owner.[112] Some courts have even suggested that the special maritime and territorial jurisdiction extends to the high seas generally, whether or not the ship in question is even partly American-owned,[113] although others disagree on this point.[114] The special maritime and territorial jurisdiction undoubtedly applies to offenses committed by or against U.S. nationals on foreign-flagged ships having a scheduled departure from or arrival to the United States, by operation of 18 U.S.C. §7(8).

The scope of special maritime and territorial jurisdiction is limited by provisions of Title 18 of the U.S. Code.[115] In the context of a failure to pick up those in distress at sea, the only relevant provisions in Title 18 that apply within the special maritime and territorial jurisdiction are: 18 U.S.C. §1111(b) (murder); 18 U.S.C. §1112(b) (manslaughter); 18 U.S.C. §1113 (murder or manslaughter attempts); and 18 U.S.C. §1115 (making it an offense for any "captain, engineer, pilot, or other person employed on any steamboat or vessel" to "destroy" the life of any person by "misconduct, negligence, or inattention to his duties on such vessel.)

Causing death by a deliberate failure to pick up those in need of assistance at sea could be manslaughter[116] and would probably constitute a violation of 18 U.S.C. §1115.[117] Although the obligation imposed by

---

[112] United States v. Keller, 451 F. Supp. 631, 636 (D.P.R. 1978) (U.S. citizens' ownership of shares in, and control of, Grand Cayman corporation that was the registered owner of U.S.-registered ship held to be sufficient for 18 U.S.C. §7(1)). However, this conclusion was not necessary for the court's decision, because the defendants were not charged with offenses under Title 18, so 18 U.S.C. §7(1) was irrelevant. United States v. Arra, 630 F.2d 836, 840 (1st Cir. 1980), *affirming Keller* on other grounds. Nevertheless, this part of the *Keller* court's decision has been applied in later cases. United States v. Pizdrint, 983 F. Supp. 1110, 1112 (M.D. Fla. 1997) (sufficient for §7(1) that some shareholders of Panamanian corporation that was as registered owner of ship were U.S. citizen); *Zenon-Encarnacion*, 185 F. Supp. 2d at 134.

[113] *Nixon*, 352 F.2d at 602; United States v. Tanner, 471 F.2d 128, 140-41 (7th Cir. 1972) (18 U.S.C. §7(1) applied to Canadian ship on high seas); United States v. Walker, 575 F.2d 209, 213 (9th Cir. 1978). *Accord* United States v. Roberts, 1 F. Supp.2d 601, 604-05 (E.D. La. 1998) 604-5 (collecting conflicting authorities without needing to choose between them).

[114] United States v. McRary, 665 F.2d 674, 678 (5th Cir. Unit B 1982) (Section 7(1) restricted to vessels owned wholly or in part by U.S. citizens); United States v. Ross, 439 F.2d 1355, 1357-58 (9th Cir. 1971) (implying that ship must be both on the high seas and registered in the United States).

[115] Thus, it does not provide a basis for an extended application of 46 U.S.C. §2304. *See supra* note 104 and accompanying text; United States v. Perez-Herrera, 610 F.2d 289, 290 n.2 (5th Cir. 1980); *Arra*, 630 F.2d at 840; Perez v. Bahamas, 652 F.2d 186, 189 (D.C. Cir. 1981). *See also* United States v. Zenon, 182 F. Supp. 2d 211, 213 (D.P.R., 2002) (emphasizing that not all offenses in Title 18 are expressed to apply throughout the special maritime and territorial jurisdiction).

[116] United States v. Knowles, 26 F. Cas. 800, 802 (D.C. Cal. 1864) (No. 15,540) (failure to pick up a person falling overboard is manslaughter).

[117] *See, e.g.*, United States v. Fei, 225 F.3d 167 (2d Cir. 2000); United States v. Hui, 83 F.3d 592 (2d Cir. 1996); United States v. Lee, 122 F.3d 1058 (1995 WL 595065) (2d Cir. 1995) (unpublished table

SOLAS, Ch. V, Regulation 10(a) may not be self-executing,[118] it is relevant in establishing "misconduct" for the purposes of §1115.

If the ship's failure to assist did not result in deaths, the only relevant provision in Title 18 is 18 U.S.C. §1113, attempted murder or manslaughter. If causing death by a deliberate failure to pick up persons in need of distress amounts to manslaughter,[119] deliberately sailing past them should amount to attempted manslaughter if they survive.

State criminal law statutes may also be relevant. For example, a Florida statute provides that offenses that are punishable if committed within the state are punishable in the same manner when committed within the state's special maritime criminal jurisdiction, which is broadly defined.[120] In *State v. Stepansky*,[121] the defendant was charged under Florida state law with burglary and attempted sexual battery on the high seas while on board a Liberian-flagged cruise ship owned by a British West Indies corporation. Florida argued that the alleged offenses occurred in the state's special maritime criminal jurisdiction because over half of the revenue passengers on board the ship originally embarked and planned to disembark finally in Florida.[122] The Supreme Court of Florida rejected the defendant's challenge of the constitutional validity of the Florida statute, holding that Congress's constitutional power to punish felonies on the high seas does not bar state prosecution.[123] The court held that jurisdiction could properly be asserted under the objective territorial principle, because of the effect the alleged offenses had in Florida,[124] and also under the passive personality principle.[125]

---

decision) (all considering convictions under 18 U.S.C. §1115 for causing death of illegal immigrants who attempted to swim ashore after the ship carrying them was intentionally grounded).

[118] RESTATEMENT, *supra* note 27, §111 cmt. i, note 6.

[119] *See supra* note 116.

[120] FLA. STAT. ANN. § 910.006(3), (4) (West 2002).

[121] 761 So.2d 1027 (Fla. 2000), *cert. denied sub nom*, Stepansky v. Florida, 531 U.S. 959 (2000).

[122] *Id.* at 1030, referring to FLA. STAT. ANN. § 910.006(3)(d) (West 2002).

[123] *Id.* at 1034-35.

[124] *Id.* at 1035-36. The court referred to the relevant principle as the "effects doctrine," but cited Strassheim v. Daily, 221 U.S. 280 (1911); *Stepansky*, 761 So. 2d at 1035.

[125] The court did not refer to the passive personality principle by name, but said that the defendant did not dispute that the United States could prosecute him by virtue of 18 U.S.C. § 7 (8), which is a manifestation of the passive personality principle. *See supra* notes 66-68 and accompanying text. The court said that the State of Florida could prosecute the defendant on the same basis if its actions did not conflict with federal law. *Stepansky*, 761 So. 2d at 1032-33.

E. The Position in Australia

Australia is party to UNCLOS,[126] SOLAS and the Salvage Convention,[127] but treaties are not self-executing under Australian law, with the result that implementing legislation is always required.[128] The only relevant legislation is the Navigation Act, 1912, Section 317A, that provides:

> The master of a ship shall, so far as he or she can do so without serious danger to his or her ship, its crew and passengers (if any), render assistance to any person, even if such person be a subject of a foreign State at war with Australia, who is found at sea in danger of being lost.[129]

Although it has been said that this provision is an implementation of Australia's obligations under UNCLOS,[130] that seems incorrect. Section 317A applies only when "judicial or arbitral proceedings relating to the provision of salvage operations are brought in Australia."[131] Section 317A is a legislative implementation of the Salvage Convention, not the SOLAS or UNCLOS provisions relating to the rendering of assistance.[132] Therefore, the provision has very limited application and would not have applied to the *Tampa* Incident. Because there are no other provisions in Australian legislation, it appears that Australian law does not impose a general statutory obligation on masters to assist those in distress at sea.

IV. THE COMMERCIAL IMPLICATIONS OF DELAY

A ship's delay imposes costs in two ways. First, there are extra out-of-pocket expenses, such as the cost of fuel to run the ship and provisions for those on board during the idle days. If a ship that has picked up refugees at

---

[126] *UNCLOS Parties*, *supra* note 17.

[127] *Status of IMO Conventions*, *supra* note 9.

[128] Minister for Immigration and Ethnic Affairs v. Teoh, 183 C.L.R. 273, 286-88 (Mason, C.J. & Deane, J.), 298 (Toohey, J.), 315 (McHugh, J.) (1995), and authorities there cited.

[129] Navigation Act, 1912, § 317A (Austl.).

[130] White, *supra* note 4, at 10; Michael White, *The TAMPA and the Law*, SEAWAYS, THE INTERNATIONAL JOURNAL OF THE NAUTICAL INSTITUTE 5, 6 (Oct. 2001).

[131] Navigation Act. 1912, § 316(1) (Austl.). This sub-section provides the scope of application of the Division of the Act (Part VII, Div. 3) in which section 317A appears.

[132] The Navigation Act 1912 gives the force of law to the Salvage Convention 1989, *supra* note 21, but not art. 10, which contains the duty to render assistance. Navigation Act 1912, § 315. Section 315 appears in the same Division as §317A. Section 316(1), *see* Navigation Act 1912, § 315 and accompanying text repeats the language of the Salvage Convention, *supra* note 21, art. 2.

sea has to divert to an unscheduled port of call, it will also have to pay extra port charges. Secondly, and more significantly in commercial terms, there is the implicit cost of the lost time itself. The old cliché is very true in relation to ships: time is money. The daily time charter hire for a large container ship such as the *Tampa*[133] is about USD 20,000 per day, depending on market conditions.[134] Someone must bear the loss for every day the ship is delayed. Although insurance will cover direct expenses such as fuel and provisions, it will not cover the indirect costs from the lost time. Exactly who bears that loss depends on the nature of the contractual arrangements with the ship's operators.

Most commercial ocean-going ships are operated under time charterparties. A time charterparty is a contract by which a shipowner agrees to provide the services of its ship and crew to the time charterer, who directs where the ship will go, what cargoes it will carry, and who earns freight for carrying those cargoes.[135] The charterparty is, in essence, an

---

[133] The *Tampa* has a carrying capacity of 2455 standard-sized shipping containers (known as TEUs, or twenty-foot equivalent units) and can carry a maximum of 44,013 metric tonnes of cargo (known as the deadweight capacity). See Ship details *at* BRS-Alphaliner, http://www.alphaliner.com/brs-alpha/search.htm (last modified Aug. 9, 2002). The *Tampa* is presently a combined container/ro-ro ship, meaning that it can carry both containers in fixed bays and also roll-on, roll-off cargo on trucks. *Wallenius Wilhelmsen Fleet List*, http://www.2wglobal.com/Global/41ModernVes/01OurVessels/31ROROCONT/31ROROCONT.jsp (last visited Aug. 9, 2002).

[134] Market information can be difficult to obtain. Howe Robinson & Co. Ltd, a large London-based containership shipbroker, maintains the Howe Robinson Containership Index, which measures fluctuations in containership time charter hire. In the first quarter of 2000, daily time charter hire for a sample containership of 35,000 deadweight tonnes and 2900 TEUs ranged from USD 18,000 per day to USD 21,500 per day. *Howe Robinson Shipbrokers Container Charter Market Quarterly Review January-March 2000*, *at* http://www.shipbroking.com/reports/fs_reports.htm (last visited Aug. 9, 2002). Because the *Tampa* carries ro-ro cargo as well as containers (*see supra* note 133) its total deadweight capacity is greater than the Howe Robinson sample ship, even though its TEU capacity is slightly smaller. Thus, its daily time charter hire would probably be higher than the Howe Robinson sample.

[135] For example, in *Hyundai Merchant Marine Co. Ltd. v. Gesuri Chartering Co. Ltd.*, the court states:

> A time charter-party . . . is a contract by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer. It is for the time charterer to decide, within the terms of the charterparty, what use he will make of the vessel.

Hyundai Merchant Marine Co. Ltd. v. Gesuri Chartering Co. Ltd. (Peonia) [1991] 1 Lloyd's Rep. 100, 106-107 (Bingham, L.J.) (Eng. C.A. 1991). Although the time charterer may wish to carry its own cargo on the ship, it is much more common for it to engage in the business of carrying others' goods by sea. Kuwait Maritime Transport Co. v. Rickmers Linie K.G., (The "Danah"), [1993] 1 Lloyd's Rep. 351, 353 (Q.B. (Com. Ct.) 1992). Although "freight" is often used to describe the goods themselves, in shipping practice it means the compensation paid to a carrier for transporting goods. BLACK'S LAW DICTIONARY 677 (7th ed. 1999).

agreement to divide responsibility for the navigational and commercial operations of the chartered ship.[136] The shipowner remains responsible for the navigational operation of the ship without concern for finding employment for it.[137] It sells to the charterer the right to make profits by charging others for the carriage of goods on the ship and in return, it receives a guaranteed flat rate of payment (known as hire) for use of the ship.[138] By doing this, the shipowner avoids the fluctuating market demand for the ship's services and can focus on the task for which it is better suited, sailing the ship from port to port. Its profits lie in its ability to run the ship for less than it receives from the charterer by way of hire. The time charterer, on the other hand, takes responsibility for the commercial operation of the ship. Because it has to pay the shipowner the agreed rate of hire each month, it must find at least that rate by way of freight payments from cargo owners or sub-charterers. It generates profit by moving more cargo freight than it must pay for monthly hire. The time charterer can focus on the fluctuations of market demand for the ship's services without concern for the essentially different task of sailing the ship from port to port.[139]

The commercial consequences of delay are allocated either to shipowner or charterer by the terms of the charterparty. Time charterparties invariably contain a clause, known as the "off-hire clause," which identifies the circumstances in which the charterer's obligation to pay hire for use of the ship shall be suspended.[140] If the ship goes off hire by operation of this clause, the commercial cost of the delay is borne by the shipowner, who ceases to receive hire payments from the charterer; if the ship remains on hire, the commercial cost of the delay is borne by the charterer, who must continue to pay hire despite the fact that the ship has been delayed.[141]

---

[136] Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 374-75 (2000).

[137] In practice, there is often a further division between ownership functions and those of nautical and technical operation. LARS GORTON ET AL., SHIPBROKING AND CHARTERING PRACTICE, 85 (4th ed. 1995). This is usually effected by means of a demise or bareboat charter, which assigns nautical and technical operation to the demise charterer and ownership to the owner. For most purposes concerned with the operation of the ship, a demise or bareboat charterer is then treated as the owner, and is generally called owner *pro hac vice*. Reed v. S.S. Yaka, 373 U.S. 410, 412 (1963), *quoting* Leary v. United States, 81 U.S. 607, 610 (1872), United States v. Shea, 152 U.S. 178 (1894).

[138] For details about propositions in this paragraph, *see* GORTON ET AL., *supra* note 137, at 18-19, 84-86, 90-92, 94-96.

[139] The charterer does, however, normally have to pay running costs such as fuel (known as bunkers) and pilotage and agency fees. *See* MICHAEL WILFORD ET AL., TIME CHARTERS 217-26 (4th ed. 1995).

[140] LARS GORTON ET AL., SHIPBROKING AND CHARTERING PRACTICE 275-282 (5th ed. 1999).

[141] *Id*

A typical example of an off-hire clause is Clause 15 of the New York Produce Exchange standard form time charterparty (NYPE):[142]

> [I]n the event of loss of time from deficiency and/or default of men or deficiency of stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting, or by any other cause preventing the full working of the vessel, the payment of hire and overtime shall cease for the time thereby lost.[143]

For example, if the ship breaks down, it goes off hire, and the charterer's obligation to pay for its use is suspended until the ship is able to perform charterer's work again.[144]

As a result, if a time-chartered ship is delayed as a result of rescuing refugees or asylum seekers in distress at sea, the question of who bears the cost of that delay is answered by determining whether the ship goes off-hire while the refugees or asylum seekers are on board. In *C.A. Venezolana de Navegacion v. Bank Line Ltd (Roachbank)*,[145] a time-chartered ship, *Roachbank*, came across a boatload of Vietnamese refugees in the South China Sea. The refugees were in "a pitiful condition"[146] and their boat was sinking, so *Roachbank* stopped to take them on board. At the next port of call, Kao-hsiung in Taiwan, the port authority initially refused to allow the ship to enter port because of the presence of the refugees. The ship remained anchored off the port for over a week. Finally, the port authority relented and allowed *Roachbank* to enter port, but only after its owner had secured a bank guarantee for an undertaking that all the refugees would

---

[142] In practice, time charter-party contracts are usually made by modifying one of a few widely-used standard forms. The New York Produce Exchange form is the most widely used. *See* WILFORD ET AL., *supra* note 139, for an extended series of annotations to the clauses of the New York Produce Exchange standard form.

[143] New York Product Exchange Form (1946), *reprinted in* 2B BENEDICT, *supra* note 3, at 7-76.11. *See generally* Martin Davies, *The Off-Hire Clause in the New York Produce Exchange Time Charterparty*, 1 LLOYD'S MAR. & COM. L.Q. 107 (1990).

[144] *See, e.g.*, Hogarth v. Miller, 1891 A.C. 48 (appeal taken from Scotland). The ship goes on-hire when it can work again, whether or not repairs have been completed. *Id.* (A ship off-hire on breakdown was towed to port and began to discharge cargo before repairs completed. The court held that it was on-hire from commencement of discharge.).

[145] [1988] 2 Lloyd's Rep. 337 (Eng. C.A.).

[146] C.A. Venezolana de Navegacion v. Bank Line Ltd. (Roachbank), [1987] 2 Lloyd's Rep. 498, 499 (Webster, J.) (Q.B.), *aff'd* [1988] 2 Lloyd's Rep. 337 (Eng. C.A.).

remain on the ship throughout its time in Kao-hsiung and that they would all leave the port with the ship.[147]

The time charterer claimed that *Roachbank* was off-hire for the period of the delay under Clause 15 of NYPE because the presence of the refugees was a "cause preventing the full working of the vessel."[148] The trial judge rejected that argument, holding that *Roachbank* remained fully efficient and capable in itself of performing the service required by the charterers; the delay had been caused by something other than the condition of the ship. The decision that the ship remained on-hire was affirmed by the English Court of Appeal.[149] Thus, the charterer bore the cost of the master's decision to pick up the refugees.

That will not necessarily be the result in all cases. Time charterparties are not contracts of adhesion; they are freely negotiated between parties of equal bargaining power,[150] and it is quite possible for a charterer to bargain that the presence of refugees puts the ship off-hire if that is what it wants,[151] although it may have to pay a little more by way of hire in return. However, it is most important in this context to understand that whether the cost of delay is allocated by the off-hire clause to the shipowner or to the charterer, it is borne by that party itself and not by its insurers.

Commercial ships carry two different kinds of insurance with two very different kinds of insurers.[152] Hull and machinery insurance covers the

---

[147] *Id* at 499-500.

[148] New York Product Exchange Form (1946), cl. 15, *reprinted in* 2B BENEDICT, *supra* note 3.

[149] Strictly speaking, the Court of Appeal refused the charterers special leave to appeal. *Roachbank*, [1988] 2 Lloyd's Rep. 337, 343 (Eng. C.A.). Special leave was necessary because the matter had come before Webster, J. as a case stated by arbitrators. *Id.* at 338.

[150] In *Fed. Commerce & Navigation Co. Ltd. v. Tradax Exp. S.A.*, the court states:

> The freight market for chartered vessels still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please.

Fed. Commerce & Navigation Co. Ltd v. Tradax Exp. S.A., 1978 A.C. stet. 1, 7 (Lord Diplock) (appeal taken from Eng.).

[151] *See, e.g.*, Whistler Int'l Ltd. v. Kawasaki Kisen Kaisha Ltd. (Hill Harmony), [1998] 2 Lloyd's Rep. 367, 370 (Clarke, J.) (Q.B. 1987), *rev'd* [2001] 1 A. C. 638 (appeal taken from Eng.) ("In the event of loss of time either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, caused by. . . refugees. . . the hire shall be suspended. . . ."). The case itself was not concerned with rescuing refugees.

[152] *See* Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 TUL. L. REV. 311, 314 (1991); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, 921 (3d ed. 2001). These sources describe the three main types of modern marine insurance cover: hull, cargo and protection, and indemnity ("P&I"). Cargo insurance is not relevant to the issue under consideration here.

ship against the risk of damage or loss; it is usually placed with commercial insurance companies or at Lloyd's of London.[153] Liability risks are insured with Protection and Indemnity Associations (usually called P & I Clubs), which are mutual self-insurance associations of shipowners that operate on a non-profit basis.[154] Nineteen P & I Clubs form the International Group; between them, those nineteen clubs insure over 90 percent of the world's ocean-going tonnage.[155]

The standard P & I Club cover indemnifies the member against any direct expenses incurred as a result of picking up those in need of assistance at sea, but it does not provide indemnity against the implicit cost of delay itself. The Rules[156] of the U.K. P & I Club (the world's largest)[157] are typical. Rule 2, Section 7 of the U.K. Club Rules provides cover against:

> Expenses of diversion of an entered ship where and to the extent that those expenses (i) represent the net loss to the Owner (over and above such expenses as would have been incurred but for the diversion) in respect of the cost of fuel, insurance, wages, stores, provisions and port charges and (ii) are incurred solely for the purpose of securing treatment for an injured or sick person or while awaiting a substitute for such

---

[153] Hayden & Balick, *supra* note 152, at 314-19.

[154] *Id.* at 325-26; *see also* Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1, 5-6 (1991). *See also* Psarianos v. Standard Marine Ltd., Inc., 728 F. Supp. 438, 451 (E.D. Tex. 1989) ("[A] protection and indemnity association is not a traditional insurance company; it is a group of shipowners who have agreed to insure one another's vessels for the mutual benefit of all"). Strictly speaking, P&I Clubs do not provide liability insurance because of their "pay to be paid" rules, which require members to pay a claim before they are entitled to indemnity from the Club pool. Ronneberg, *supra* note 154, at 5-6. *See also* Firma C-Trade, S.A. v. Newcastle Prot. & Indem. Assoc. (Fanti and Padre Island, No. 2), [1991] 2 A.C. stet. 1, 28 (Lord Brandon of Oakbrook) (appeal taken from Eng.) (incurring liability gives member only a contingent right against the club because it is "a condition precedent to the members being indemnified by the clubs in respect of those liabilities that they should first have been discharged by the members themselves.").

[155] *See* U.K. P. & I. Club, *About P. & I.: The International Group of P. & I. Clubs*, *available at* http://www.ukpandi.com/ukpandi/2about.html#International (last visited August 8, 2002). Although they compete with one another for business, the nineteen Clubs in the International Group pool their larger risks by agreement, and buy reinsurance for the group as a whole for claims exceeding the pool agreement. The combined effect of the pooling and reinsurance arrangements is that the clubs in the group are covered up to USD 2.03 billion per claim (USD 1 billion in the case of oil pollution claims). *Id.*

[156] The contract of insurance between the member and the Club, and between the members themselves, is in the terms of the Club rules. *See* Firma C-Trade, S.A. v. Newcastle Prot. Indem. Assoc. (Fanti and Padre Island, No. 2), [1991] 2 A.C. stet. 1, 23 (Lord Brandon of Oakbrook) (appeal taken from Eng.).

[157] U.K. P. & I. Club, *General Introduction to the U.K. P. & I. Club*, *available at* http://www.ukpandi.com/2about.html#club (last visited August 8, 2002). The U.K. P. & I. Club insures well over 100 million tonnes of owned and chartered ships, more than one-fifth of the world total. *Id.*

> person or for the purpose of landing stowaways or refugees, or for the purpose of saving life at sea.[158]

The Club Rules of Assuranceforeningen Gard, the Norwegian-based P. & I. Club in which the *Tampa* was (and is) entered,[159] are even more explicit. Rule 32 provides:

> The Association shall cover costs and expenses directly and reasonably incurred in consequence of the Ship having stowaways, refugees or persons saved at sea on board, but only to the extent that the Member is legally liable for the costs and expenses or they are incurred with the approval of the Association. The cover does not include consequential loss of profit or depreciation.[160]

Following a description of the *Tampa* incident in *Gard News*, the Gard Club's newsletter, there is a description of the Club's cover for expenses incurred in saving life at sea, which says: "It must be noted that the cover under the P & I policy does not include the financial loss to the member due to the delay."[161]

Thus, if a ship is delayed as a result of doing as it should, stopping to aid persons in need of assistance at sea, the implicit cost of the delay is absorbed by the ship's operator, either the owner or time charterer (if there is one). The powerful commercial disincentive to assist potential refugees is made more powerful if nearby countries with potential places of refuge are reluctant to allow the ship to land the refugees, as they were in the *Roachbank* case and the *Tampa* Incident. The resulting additional delay directly affects the ship operator's financial position and can rapidly run into hundreds of thousands of dollars.

---

[158] U.K. P. & I. Club, *Rules and By-Laws 2002*, Rule 2, Section 7, *available at* http://www.ukpandi.com/Rules2002/Rules_02.pdf (last visited Aug. 8, 2002).

[159] *Gard P. & I. List of Vessels 2002*, 76 (2002), *available at* http://www.gard.no/Publish/ListOfVessels/ListOfVessels.pdf (last visited Aug. 8, 2002).

[160] Assuranceforeningen Gard, *Statutes and Rules 2002*, Rule 32, http://www.gard.no/Publications/statutesandrules/rules/p2_chapter1.html (last visited Aug. 8, 2002). The rules of Assuranceforeningen Skuld, another Norwegian Club, are even clearer. Assuranceforeningen Skuld, *Statutes and Rules 2002*, Rule 11, http://www.skuld.com/intro/statutesrules/artikkel.asp?id=684 (last visited Aug. 23, 2002). The Skuld rules provide cover for extra costs incurred in assisting in the rescue of persons at sea, but exclude costs "which are incurred in respect of . . . the loss of freight or hire for the entered vessel" *Id* at Rule 11.2.2(a).

[161] *Gard's Cover for Expenses Incurred in Saving Life at Sea*, 165 GARD NEWS, Feb.-Apr. 2002, at 9, www.gard.no/Publications/GardNews/RecentIssues/gn165/art_3.asp (last visited Aug. 8, 2002).

V. CONCLUSION

The problem identified in this Article cannot be remedied by amendment to existing international legal norms. The existing treaty provisions state the obligation to assist broadly enough, and they have been widely adopted. No amendment to strengthen them would have any appreciable impact on the plight of those in need of assistance at sea. The problem is one of ineffective enforcement, which is largely a product of the prevalence of flags of convenience states. The IMO has long made a concerted effort to improve the safety record of all ships, particularly those registered under flags of convenience, but that effort understandably focuses on the safety of the ships themselves.[162]

A large part of the solution to ineffective flag state control has been an increase in port state control—that is, oversight by coastal state authorities of seaworthiness and compliance with international ship safety obligations when foreign-flagged ships visit port.[163] However, neither port state control nor enhanced flag state enforcement of international safety requirements will help those in distress at sea, despite the fact that the principal safety convention, SOLAS, contains an obligation to assist.

The insurance arrangements on commercial ships are such that enforcement of seaworthiness and safety requirements can effectively be delegated to independent third parties, namely classification societies.[164]

---

[162] *See* Heike Hoppe, THE WORK OF THE SUB-COMMITTEE ON FLAG STATE IMPLEMENTATION – AN OVERVIEW (2000), *at* http://www.imo.org/InfoResource/mainframe.asp?topic_id=406&doc_id=1080 (last visited Aug. 19, 2002).

[163] *See,* John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GA. J. INT'L & COMP. L. 571 (1997); Ademuni Odeke, *Port State Control and U.K. Law*, 38 J. MAR. L. & COM. 657 (1997); Z. OYA OZCAYIR, PORT STATE CONTROL (2001).

[164] Hannu Honka, *The Classification System and Its Problems With Special Reference to the Liability of Classification Societies*, 19 TUL. MAR. L.J. 1, 4 (1994) ("Governments regulate seaworthiness to protect the public interest. However, most governments have delegated their supervisory powers to classification societies."). Classification societies such as Lloyd's Register of Shipping and the American Bureau of Shipping act as neutral third parties, undertaking ship surveys to provide seaworthiness and safety information, principally to insurers. Masataka Hidaka, *The Role of Class in Meeting the Safety Challenge*, *available at* http://www.iacs.org.uk/seatrade.htm (last visited Aug. 19, 2002). All P & I Clubs make it a condition of entry that the ship be maintained in class with an approved classification society, often a member of the International Association of Classification Societies (I.A.C.S.). *See, e.g.,* Assuranceforeningen Gard, *Statutes and Rules 2002*, *supra* note 160, at Rule 8(1)(a) ("It shall be a condition of the insurance of the Ship that . . . the Ship shall be and remain throughout the period of entry classed with a classification society approved by the Association."). Similarly, hull insurance policies typically require the shipowner to keep the ship in class through the life of the policy. *See, e.g.,* Institute Time Clauses (Hulls), cl. 4.1.1 *reprinted in* N. GEOFFREY HUDSON & J.C. ALLEN, THE INSTITUTE CLAUSES 95-96 (3d ed. 1999) ("It is the duty of the Assured . . . at the inception of and throughout the period of this insurance to ensure that . . . the vessel is classed with a Classification Society agreed by the underwriters and that her class within that Society is maintained.").

Enforcing compliance with the obligation to assist cannot be delegated in the same way: it falls squarely on the shoulders of the flag state itself or, within the territory covered by the SAR Convention,[165] the coastal state. As noted above, many flag-of-convenience states either have no functioning legal system at all, or no resources available to engage in extra-territorial enforcement of their laws.

It is difficult to hide the sub-standard condition of a ship from port state control authorities, but sadly it is easy to hide a failure to pick up persons in need of distress at sea,[166] if the complicity of the crew can be maintained[167] and if coastal state search and rescue services have not spotted those in distress and traced the ship's proximity to them. The expansion and strengthening of the SAR Convention that occurred in 2000 provides perhaps the best prospect of more effective enforcement.[168] As noted above, if a coastal state that is party to the SAR Convention were to direct a commercial ship to provide assistance to persons in distress at sea, that country would probably be entitled to exercise criminal jurisdiction over the master if he or she refused to comply, regardless of whether the ship was on innocent passage at the time.[169] The high seas cover a very large area, though, and it is likely that many small boats carrying refugees and asylum seekers will remain undetected except by commercial ships.

A commercial ship encountering persons in distress at sea provides a weak legal incentive to assist, coupled with a powerful commercial disincentive from doing so (and, of course, a strong moral obligation to do so). The longer the delay to the ship as a result of rescuing those in distress, the less likely it is to do as it should. To put it bluntly, government reluctance to allow rescued refugees to be placed ashore, such as that shown by Australia in the *Tampa* Incident, is likely to cause more refugees to die at sea.

---

[165] SAR Convention, *supra* note 90.

[166] *See Of Dogs, Fish and Men, supra* note 5.

[167] *Compare* Sangeorzan v. Yangming Marine Transp. Corp., 951 F. Supp. 650 (S.D. Tex. 1997) (Romanian stowaways died after being thrown overboard following their discovery on Taiwanese ship; and the surviving family members sued shipowner relying on evidence of crew members as witnesses.)

[168] The SAR Convention was amended on May 18, 1998 by resolution of the IMO's Maritime Safety Committee (Res. MSC.70(69)) with effect from January 1, 2000. *See* SAR Convention, *supra* note 90. The amendments place increased emphasis on regional cooperation and co-ordination between member countries. *See International Convention on Maritime Search and Rescue 1979, The 1998 Amendments,* http://www.imo.org/Conventions/contents.asp?doc_id=653&topic_id=257#6 (last visited August 19, 2002).

[169] *See supra* note 93 and accompanying text.